

Appl. No.	:	10/626,136
Applicant	:	Kerry Hawkins
Filed	:	July 24, 2003
Title	:	Opener For Pull Top-Type Cans
Art Unit.	:	3723
Examiner	:	Muller, Bryan R.
Conf. No.	:	9353
Docket No.	:	HAWK 8693US

**DECLARATION OF KERRY HAWKINS
UNDERAMENDMENT 37 CFR §1.132**

I, Kerry Hawkins, do hereby declare that:

1. I am the applicant of the above noted application.
2. In the Office Action dated October 6, 2004, the Examiner rejected the Claims 1-4, 6, 7, 15 and 16 in my application as being anticipated by Nagy, Pat. No. 6,311,580. Additionally, the Examiner rejected Claim 5 as being obvious over Nagy in view of Kelly, Pat. No. 5,309,749.

The Nagy Patent

3. Nagy discloses an opener for opening beverage cans. Nagy does not disclose that his opener can be used to open any other type of can. The Nagy opener includes a head or lift tab securing portion (32) having a protruding force application element (36, 136, 232) and a tab engaging portion (37, 137, 237).

4. Nagy provides that the protruding force application element extends "generally in the opposite direction" from the tab engaging portion. (see Col. 3, lines 15-17) However, In FIGS. 1-2 of Nagy, the force protruding element appears to extend generally in the *same* direction as the tab engaging portion; in FIG. 3, the force protruding element extends at an angle of about 90° relative to the tab engaging portion;

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and in FIG. 4, the force protruding element extends at an angle that appears to be greater than about 90° relative to the tab engaging portion, but not in the opposite direction of the tab engaging portion. Considering the general definition of "opposite" none of the Nagy figures appear to show what is described in the specification. Only FIGS. 3 and 4 show a force protruding element that extends in a different direction (as opposed to an "opposite direction) from the tab engaging element.

5. In use, as seen in FIG. 4 of Nagy, the protruding force application element is positioned on the beverage can opening tab at an end of the tab opposite the tab ring and the lift tab securing portion is passed through the ring of the tab. With the opener positioned as shown in FIG. 4 of Nagy, the opener is pivoted about the end of the protruding force application element to raise the tab ring up and to press the end of the tab overlying the can's drinking opening down to open the can drinking opening (36 in Nagy, FIG. 4) to allow one to drink the beverage contained therein.

6. I made samples of the Nagy openers shown in the Nagy patent. Photographs of the Nagy openers are shown in Exhibit 1 attached hereto. Physical samples of the Nagy openers shown in Exhibit 1 are attached hereto.

7. Nagy at Col. 3, lines 28-32 provides that:

"The force application element 36, 136, 236 is spaced apart from the central region 44, 144, 244 of the tab engaging portion 37, 137, 237 a distance which corresponds to the distance between the furthest edges of the ring portion 42 from the opposing end 23 of the lift tab 20. Preferably, the distance between the outer edge of the central region 44, 144, 244 of

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the tab engaging portion 37, 137, 237 and the tip 46, 146, 246 of the force application element 36, 136, 236 is about 16 to 20 mm."

In view of Nagy's assertion that the noted spacing is critical, to make the samples shown in Exhibit 1, I enlarged Nagy's patent drawings until the noted distance was obtained. I then used the enlarged drawing as a template, and cut the specimens from a hard plastic. The Nagy drawings are all plan views of the opener. Hence, I was able to simply enlarge the drawings as noted above and use the drawings as a template to produce the samples. The photograph of Exhibit 1 is annotated to show which opener corresponds to the various Nagy openers, and to show the size of the "spacing" as described in Nagy. The photograph of Exhibit 1 also includes my opener, so that it can be seen that the Nagy opener and my opener are generally on the same scale. My opener is noted as the "Hawkins Opener". A physical sample of my opener is included with the physical samples of the Nagy openers noted above.

8. After cutting the different Nagy openers, I attempted to use the Nagy opener with a beverage can, as shown in FIG. 4 and described in the Nagy patent. Only the opener of FIG. 4 was effective to open a beverage can. The Nagy opener of FIG. 3 was marginally operable. Because of the position and direction of the "force application member" relative to the "tab engaging member", and the shape of the force application member, the opener of Nagy FIGS. 1 and 2, did not operate to open a beverage can as described in Nagy. Specifically, when the tab engaging member is

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passed through the beverage can's tab ring, pivoting of the opener begins to lift the tab. However, because the force application member is curved, and because it extends generally in the same direction as the tab engaging element, as the opener is pivoted, the force application member slides along the top of the can, and does not press the fixed (or riveted) end of the tab downwardly to open the drinking opening of the can. Hence, the openers of Nagy FIGS. 1 and 2 did not open the beverage can, and therefore inoperable for the purpose for which it was designed – namely opening beverage cans.

The Hawkins Opener

9. My opener is substantially different from the opener described in Nagy. First of all, my opener is meant to be used to aid in opening pull-top type cans, such as single serving fruit or pudding cans, soups and moist pet food (such as cat and dog food). Secondly, the construction and operation or use of my opener is substantially different from the construction and use of the Nagy opener.

10. As seen, for example, in FIG. 1, my opener comprises a body or head (14) having a bottom surface or heel (23) which is generally U-shaped. A surface or lip (32) is formed at the upper end of the front of the heel and a starting notch (26) is formed at the back of the surface (32). As illustrated in FIG. 2 of my application, the lip (32) is described to have a length such that the surface can pass through the ring of an

opening tab of a pull-top type can and the notch (26) is sized to receive the tab ring. A finishing notch (28) is positioned above the starting notch (26).

11. Pull top type lids are generally made of aluminum or steel. When they are pulled off the can, they are curved, as seen for example, in FIG. 3B of my application, and as shown in Exhibit 2, attached hereto. When the lid is curved in this manner, it has a spring force. This spring force, in conjunction with the force applied to the lid as the lid is pried off the can, usually causes the lid to fly off of previous openers. Hence, preferably, there is a pathway, such as the pathway 42 in FIG. 1, which leads to the notch 28. The pathway 42, in conjunction with the finishing notch 28, serves as a retainer to prevent the lid from flying off the opener. In the various embodiments shown in the drawings of my application, I show other configurations for a pathway which operates as a retainer.

12. The operation of my opener is described in my application at paragraphs [0031] and [0032] and is shown in FIGS. 2, 3A and 3B of the application. Use of my opener is also shown in the photographs attached as Exhibit 2 hereto.

13. As described and shown in my application, and as shown in the Exhibit 2, FIG. 1, initially, the lip or surface 32 is passed under the tab ring so that the tab ring is received in the starting notch (26). As seen, the opener is applied to the tab from the free end of the tab (i.e., opposite from the tab rivet (R)), which is just the opposite direction of the way Nagy's opener is applied. Once the tab ring is received in the

starting notch 26, the opener body is pivoted about the heel (with the heel on the can lid) until the tab is raised (Exhibit 2, FIGS. 2-3). At this point, the rivet end of the tab has been pushed downwardly to break the seal of the can, and the lid has been partly lifted or separated from the can.

14. The starting notch is then disengaged from the tab, and with respect to application FIG. 1, the lip 36 is passed through the tab ring, such that the tab ring will be received in the finishing notch (28). As seen in FIG. 3A of the application and in Exhibit 2, FIG. 4, in this position, the handle is raised upwardly with respect to the position it was in when the tab had been lifted by the starting notch (Exhibit 2, FIG. 3). This raised position of the handle provides new leverage (with respect to the position of the handle in Exhibit 2, FIG. 3). The handle is then pushed down causing the opener head to pivot about the heel 23. (Exhibit 2, FIG. 5) With the tab engaged in the finishing notch (28), as the head is pivoted, the lid is pried off the can. (Exhibit 2, FIG. 6) When the lid is pried off the can, the retainer holds the lid to the opener, as seen in Exhibit 2, FIG. 7).

15. It is to be understood, that in operation, the heel of my opener rests on the lid of the can. Hence, the heel acts as a fulcrum and allows the user to use the leverage provided by the handle to pry the lid off the can.

The Nagy Opener Does Not Work If Used In Accordance With The Manner In Which My Opener Is Used

16. In his office action, the Examiner asserted that Nagy includes a heel and both a starting notch and a finishing notch. Specifically, the Examiner asserted that:

"Nagy discloses a can opener (10) having a forward surface, a rear surface, and a bottom surface, at least said bottom surface being curved to define a rounded heel (32) with a first portion (near 32) defining a first radius and a second portion (near 36) defining a second radius, said first radius being greater than said second radius. Nagy also discloses a first port (50) extending from a forward surface of the body and opening into a starting notch (36) [notch being defined as "A V-shaped cut] located at the front surface and a second port (39) extending from a forward or upper surface of the body and opening into a finishing notch (44) also located at said front or upper surface, said finishing notch being spaced above said starting notch, a handle (34), a body (30) being formed at one end of the handle, a retaining portion (38) defined by a lip that is part of a channel extending over the opening of the finishing notch and extending from forward ends of the opener to finishing notch."

17. I made the Nagy openers (shown in Exhibit 1) as described above to see if they would work in the manner in which my opener works. Stated simply, they do not. Operation of the Nagy openers in accordance with the manner in which my opener is meant to be used is shown in Exhibits. 3-7. Exhibits 3 and 4 show the opener of Nagy Fig. 1, but at two different sizes. Exhibit 5 shows the Nagy opener of FIG. 2; Exhibit 6 shows the Nagy opener of FIG. 3; and Exhibit 7 shows the Nagy opener of FIG. 4.

18. As seen in Exhibits 3 and 4, when the Nagy opener of FIG. 1 is used and the tab ring is placed in the space (50) of Nagy and the Nagy opener is pivoted about the bottom curved surface of the force application element, the Nagy opener cannot lift

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the tab to break the seal of the pull-top type can. This is due to the fact that the surface along the bottom of the force application element (36) does not have sufficient curvature. The shape of the heel of my opener provides the torque necessary, in the first step, to raise the tab. Hence, the space (50) of Nagy is not a starting notch, as set forth in the claims of my application.

19. Despite the fact that Nagy could not perform the first step of the opening procedure, I inserted the tab in the space (39) of Nagy. As seen in Exhibit 3, when the tab is engaged in the space 39, the opener cannot be pivoted about the bottom surface of the prong (36) to pry the can lid off the can. Again, the shape of the Nagy opener does not provide the leverage necessary to remove the lid from the can.

20. As noted above, the Examiner also asserted that the prong (38) of Nagy operated as a retainer. Because of the generally V-shaped opening defined by the prongs 38 and 40 of Nagy, if Nagy were operable to remove the can lid off the can, at the moment of separation of the lid from the can, the forces acting on the can lid would cause the can lid to fly off the opener. This can be compared to Exhibit 2, FIG. 7 wherein the tab ring is held in the retainer of my opener. The prong 38 does not operate to retain the can lid on the opener.

21. The Nagy opener cannot be used, and does not operate, in the same manner as my opener to remove the lid from a pull-top type can. Thus, Nagy does not include both a starting notch and a finishing notch. Rather, Nagy includes only one

space which operates as a tab receiving notch, namely, the space between the prongs 37 and 38 (with reference to FIG. 1 of Nagy). Further, Nagy does not include a generally U-shaped heel. Specifically, the curvature of the bottom of the force application element (which the Examiner refers to as the heel of Nagy) is not shaped such that when a can opening tab is received in the gap between the force application element and the tab engaging element, pivoting of the can opener about the heel will pivot the tab sufficiently to cause the tab to break the seal of the can lid. Nor is the curvature of the bottom of the force application element sized such that when the opening tab is received in the notch above the tab engaging element, pivoting of the can opener about the heel will remove the lid from the can.

22. The operation of the Nagy opener of FIG. 2 is shown in Exhibit 5. As seen therein, the same results occur as with the Nagy opener of FIG. 1. Namely, when the can opening tab is placed in the gap between the force application element and the tab engaging element, and when the can opener is pivoted, the opener cannot raise the tab sufficiently to break the seal. Additionally, when the tab is engaged with the tab engaging element, the opener is inoperable to remove the lid from the can.

23. The operation of the Nagy opener of FIGS. 3 and 4 is shown in Exhibits 6 and 7. As seen therein, the space between the force application element and the tab engaging element does not form a notch which can receive the can opening tab, and

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the force engaging element cannot be used to lift the can tab as required if the opener were to operate in accordance with my opener.

24. It should be noted that the opener shown in Figure 4 of Nagy conforms more closely to Nagy's written description than do the openers shown in FIGS. 1-2, because the two prongs 36 and 37 extend in different directions. As I experimented with the samples I concluded that the more closely the tools conformed to Nagy's specifications of two prongs extending in generally opposite directions, then the less effective the tool was for gripping a tab in the space between the two prongs (i.e., the space or gap the Examiner asserts corresponds to the starting notch in my opener) as would be required by my opener. When the prongs begin to go in opposite directions, this gap becomes so wide that it can no longer grip a tab and does not operate as a notch. In the opener of Exhibit 7, the space between the two prongs is ineffective for gripping a can tab.

The Kelly Reference

25. I understand that during the interview of December 22, 2004, the Examiner asserted that the opening of the Kelly reference (Pat. No. 5,309,749) may act as a retainer. Hence, I also made an opener in accordance with the Kelly reference. A photograph of the Kelly opener is shown in Exhibit 8. This sample of the Kelly opener was made in the same way as were the samples of the Nagy opener. I enlarged the

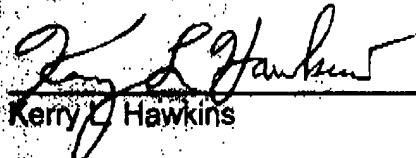
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patent drawing of the Kelly opener to an appropriate size. The opener shown in Exhibit B has a diameter of about 4".

26. Initially, I note that the Kelly opener is difficult to use. However, more importantly, when the Kelly opener does pry the lid of the can, the forces acting on the lid cause the tab to move around the surface or edge of the opener, and slide right off the opener. Due to the shape of Kelly, not even the gap in the opener (which, in the Kelly patent appears to be small) will act as a retainer.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.



Kerry L. Hawkins

Date: Jan. 5, 2005